BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MELVIN FRANDSEN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 98-032930** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: January 4, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Pocatello, Idaho, on July 28, 2004. Reed W. Larson of Pocatello represented Claimant. Kenneth L. Mallea of Meridian represented Defendant. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on November 16, 2004 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant's condition is due, in whole or in part, to a preexisting injury or cause;

2. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;

3. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine;

4. Whether Defendant, State of Idaho Special Indemnity Fund (ISIF), is liable under Idaho Code § 72-332; and

5. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant sustained serious injury in an industrial accident on September 30, 1998. Claimant avers that he has a permanent impairment as a result of that accident, and that his most recent injuries, together with his pre-existing impairment (disarticulation of his right arm at the shoulder), his age, education, and work history, he is totally and permanently disabled as an odd-lot worker. Claimant argues that Defendant is liable under Idaho Code § 72-332 for 94% of his disability.

Defendant does not dispute that Claimant had a substantial pre-existing impairment, that it was manifest, and that it was a subjective hindrance. Neither does it dispute that he sustained injuries and impairment as a result of the September 1998 accident. Defendant argues, however, that Claimant's disability is not the result of the *combination* of his pre-existing and subsequent injuries, relieving Defendant of any liability for Claimant's disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Claimant's Exhibits 1 through 11 admitted at hearing; and

3. The post-hearing depositions of Hugh S. Selznick, M.D., and Nancy J. Collins, Ph.D.

The objections entered by counsel for Defendant in the Selznick Deposition at page 8 and the Collins Deposition at page 7 are sustained. All other objections are overruled. After having

considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 79 years of age and lived in Lava Hot Springs, Idaho. Claimant has an 8th grade education. Claimant has lived in southeastern Idaho almost his entire life.

WORK HISTORY

2. After leaving school at age 16, Claimant worked on the family farm until November 1943 at which time he enlisted in the U.S. Army. He served until May of 1946 and received an honorable discharge.

3. After his discharge from the military, Claimant worked at a coal mine in Utah. In March of 1947, he was involved in a mining accident and did not work for a year.

4. When Claimant returned to work in 1948, he started doing custom hay baling, and continued in this business for approximately ten years.

5. In the late 1960s, Claimant went to work for his brother, Paul, who operated a farm outside of Lava Hot Springs. Claimant did all kinds of farm work, including irrigation, planting, tilling, driving tractor, and baling hay. Claimant left the family farm and worked briefly in a tungsten mine in Nevada and for about a year at Blackfoot Equipment Company.

6. In the early 1970s, Claimant returned to Lava Hot Springs and worked on the family farm. In addition to the farm work, he helped his brother with a part-time well-drilling business.

7. Claimant turned 62 in 1987 and began collecting social security benefits. The benefits were not sufficient to live on, so Claimant continued to work off and on, primarily for his nephews on the family farm near Lava Hot Springs.

8. In August 1998, Claimant went to work driving a tractor mower for the golf course at Lava Hot Springs. According to the First Notice of Injury and Claim for Benefits (Form 1), Claimant worked approximately fifteen hours per week (five hours per day, three days per week), at the rate of $6.00 per hour.[1]

INDUSTRIAL ACCIDENT HISTORY

9. In 1947, while working in the coal mine in Utah, Claimant was involved in a mining accident. He lost his right arm at the shoulder, and sustained fractures of his pelvis, right leg and ankle, and three vertebrae in his lumbar spine. Claimant convalesced for a year. Claimant testified at hearing that once he had recovered from the mining accident, he had no further problems with his right leg and ankle or the pelvis fracture. Apparently he did have some low back pain (the record is unclear whether this complaint was shortly after the accident or many years later), which spontaneously resolved.

10. At some time after the 1947 injury, Claimant had a left wrist injury as a result of operating a potato digger.

11. On September 30, 1998, Claimant was operating a tractor mower for Employer when the mower became clogged with grass. Claimant got off the tractor and cleared the blockage. When he tried to re-mount the tractor, he knocked the gear shifter into reverse. The

[1] The record is not clear on Claimant's actual wage. At hearing, Claimant testified he was making $5.50 per hour. In his deposition some years earlier, he stated he was making $5.00 per hour. The Referee believes that the Form 1, prepared by the Employer on the date of injury and listing Claimant's wage as $6.00 per hour, is the most reliable evidence of the time of injury wage.

tractor backed up over Claimant, and pinned him beneath. Claimant was dragged a short distance before the tractor became stuck. Claimant was apparently pinned for some time (records suggest from 20 to 45 minutes) before he was rescued. Claimant sustained internal injuries, massive bilateral degloving injuries from his mid-back through his hips and thighs, left shoulder impingement syndrome and left biceps injury. He was released from the hospital but was readmitted in mid-October due to complications resulting from the degloving injuries. He remained hospitalized until late in December 1998.

12. Following his 1998 injury, and primarily as a result thereof, Claimant was diagnosed with congestive heart failure (CHF) and arrhythmia related to concentric ventricular hypertrophy.

DISCUSSION AND FURTHER FINDINGS

PERMANENT PARTIAL IMPAIRMENT (PPI)

13. There is nothing in the record regarding impairment ratings for Claimant's 1947 mining injury or his left wrist injury. The impairment rating for the loss of his right arm is easily calculated based on Idaho Code § 72-428 (1). The statutory rating for disarticulation of an upper extremity at the shoulder is 60% of the whole person.

14. In June 1999, Richard T. Knoebel, M.D., performed an examination of Claimant and evaluated Claimant's impairment at 6% of the whole person for the upper extremity injuries and 2% whole person impairment for the permanent scarring and tissue damage resulting from the degloving injuries over his bilateral hips. These two impairments combine for an 8% whole person impairment resulting from the 1998 accident.

15. In January 2001, Dr. Selznick, who treated Claimant's left shoulder and elbow injuries, opined that he was 100% disabled. Dr. Selznick was not asked to apportion the

disability between the 1947 amputation and the 1998 injury and did not do so of his own accord. During his deposition, Dr. Selznick admitted that he was not familiar with the legal definition of total and permanent disability. Dr. Selznick's opinion as to Claimant's disability status is without support and is disregarded by the Referee.

16. Combining the 60% whole person PPI for the 1947 accident with the 8% whole person PPI for the 1998 accident, results in a total PPI of 68% of the whole person.

ODD-LOT

17. Claimant argues in his briefing that he is totally and permanently disabled under the odd-lot doctrine.

"The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 584, 38 P.3d 617, 622 (2001) citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work.

> They are simply not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.

Id., 136 Idaho at 584, 38 P.3d at 622. A claimant can establish odd-lot status as a matter of law where "the evidence is undisputed and reasonably susceptible to only one interpretation," *Lyons v. Industrial Special Indemn. Fund*, 98 Idaho 403, 407, 565 P. 2d 1360, 1364 (fn 2) (1977). *See also, Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P. 2d 312 (1990). On the facts of this case, given Claimant's rated impairments, his unrated wrist injury, the diagnosis of congestive heart failure, his age, his education, and his work history (none of which are really disputed), the Referee finds that Claimant is totally and permanently disabled under the odd-lot doctrine.

ISIF LIABILITY

18. The determination that Claimant is totally and permanently disabled necessarily leads to the real issue of this proceeding—whether Defendant is liable for a portion of Claimant's total disability income benefits. Under Idaho Code § 72-332, ISIF pays a portion of income benefits for workers who, while partially disabled from a previous accident, become totally disabled in a subsequent accident. This provision encourages the employment of individuals with pre-existing impairments by relieving their current employer from liability for possible aggravations of the worker's previous condition by a subsequent accident.

There are four requirements that must be met in order for a claimant to establish ISIF liability under Idaho Code § 72-332:

1. Whether there was a preexisting impairment;

2. Whether the impairment was manifest;

3. Whether the impairment was a subjective hindrance; and

4. Whether the impairment in any way combines in causing total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). Only the fourth requirement is at issue in this proceeding. The Referee limits her discussion and findings to the sole remaining question of whether Claimant's pre-existing impairment *combined with* his September 30, 1998 injury to cause his total and permanent disability.

19. To satisfy the 'combined effects' requirement in I.C. § 72-332(1), a claimant must show that *but for* the pre-existing impairments, he would not have been totally permanently disabled. *Garcia v. J.R. Simplot Co.,* 115 Idaho 966, 772 P. 2d 1973 (1989). (Emphasis added). Although the "combined with" requirement of Idaho Code § 72-332 has generated a number of appellate decisions, most of the litigated cases have involved two common scenarios: 1) where

the claimant was already totally and permanently disabled as an odd-lot worker prior to the most recent industrial injury; and 2) where the Claimant became totally and permanently disabled solely as a result of the most recent industrial injury. The Court has carefully laid out a framework for analyzing these two common situations and determined that the "combined with" requirement has not been met in either situation. The case at bar, however, does not involve either of these two scenarios. Rather, ISIF contends that Claimant is totally and permanently disabled because of his congestive heart failure and his age, both of which are unrelated either to his pre-existing right arm disarticulation or his 1998 industrial accident.

ISIF's position on the "combines with" requirement in this proceeding ultimately rests on an issue of timing. ISIF argues that Claimant's disability status must be determined at the time of hearing—and at the time of hearing, Claimant's heart condition and age were what were keeping him from the possibility of employment. ISIF's argument is not persuasive and is directly contrary to the Court's analysis of the timing issue as set out in *Bybee v. State, Indus. Special Indem. Fund,* 129 Idaho 76, 921 P. 2d 1200 (1996).

Bybee involved a fact situation wherein the Commission had determined that the claimant's pre-existing injuries did not combine with her subsequent industrial accident because at the time of the subsequent industrial accident she was already totally and permanently disabled as an odd-lot worker. Bybee appealed the Commission's determination that ISIF was not liable for a portion of her disability, arguing that the Commission misapplied *Garcia*. In affirming the Commission's decision the Court addressed the timing issue:

> [G]iven the requirement in [Idaho Code] Section 72-332(1) that the preexisting impairment and subsequent injury combine to result in total disability, it is implicit in the Garcia test that the relevant point in time is the point at which the injury occurs. Stated more specifically, the test is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of the injury. This statement of the rule encompasses

> both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the preexisting impairment.

Id. at 801, P.2d at 1204.

20. The Referee finds that Claimant has met his burden of proving that the disarticulation of his right arm at the shoulder (his preexisting impairment) combined with the injuries to his left arm and shoulder that resulted from the 1998 accident, rendered him totally and permanently disabled and entitled to contribution for his disability from ISIF. The Referee reaches this conclusion based on an analysis of the facts extant immediately following the 1998 injury as required by *Bybee* and *Garcia.* Despite his missing arm, Claimant had been gainfully employed his entire life. While most of the work was seasonal, he nevertheless was able to earn enough during his working months to carry him through the off-season. Even after he "retired" in 1987 at the age of 62, Claimant continued to work, seasonally but continuously, until his accident on September 30, 1998. Employer had hired Claimant only a little over a month previously when he was 73, had undiagnosed congestive heart failure, and was missing an arm. On September 30, 1998, Claimant was still 73 years of age, still working, still missing an arm, and still had undiagnosed congestive heart failure. While the heart problem was preexisting, neither it, nor his age, nor his previous impairments prevented him from working. But for the injuries sustained on that date to his one good arm, Claimant could have returned to work for the time of injury employer. Claimant's advancing age and attendant age-related health problems that followed in the six years between the accident and the hearing are not relevant to the determination of ISIF liability.

APPORTIONMENT UNDER CAREY

21. Apportionment of the liability in this matter is determined according to the formula set out in *Carey v. Clearwater Cty. Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984). Claimant had a preexisting impairment of 60% at the time of his September 1998 injury. The impairment resulting from the September 1998 injury is 8%. ISIF is responsible for 88.24% of Claimant's disability, inclusive of impairment, from the date he reached maximum medical improvement.

BENEFITS RATE

In its briefing, ISIF raises an issue as to the rate at which Claimant's disability benefits should be paid. As this issue was not previously noticed or heard, it will not be addressed herein. The Referee draws the attention of the parties to Finding of Fact No. 8 for guidance in calculating the benefits rate.

CONCLUSIONS OF LAW

1. Claimant sustained an impairment of 8% of the whole person as a result of the September 30, 1998 industrial accident.

2. At the time of the 1998 industrial accident, Claimant had a preexisting whole person impairment of 60% resulting from the loss of his right arm in a mining accident in 1947.

3. Claimant is totally and permanently disabled under the odd-lot doctrine.

4. ISIF is liable under Idaho Code § 72-332 for 88.24% of Claimant's total disability, inclusive of impairment, from the date Claimant reached maximum medical improvement.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 20th day of December, 2004.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Legal Associate

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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